IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1025 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES Yes

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? : NO No

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GOVINDLAL SHIVLAL SAINI

Versus

NANDLAL KALURAM SAINI DECD. THROUGH HIS HEIRS & LRS.

Appearance:

MR RC KAKKAD for Petitioner

MR DK ACHARYA for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/06/2000

CAV JUDGEMENT

The Petitioner above-named has preferred this Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908, challenging the judgment & order recorded by the learned Civil Judge (S.D.) at

Palanpur in Special Execution Petition No. 3 of 1993; whereby learned Executing Court rejected the contentions of the petitioner and directed the execution petition to proceed further against the petitioner.

2. The facts may be briefly stated as follows:-

The 1st. respondent above-named filed a Special Civil Suit being Special Civil Suit No. 45 of 1975 against the petitioner as well as the 2nd respondent. The petitioner in fact is the son of 2nd respondent. The records show that the 2nd respondent has died and his legal representatives have not been joined in place of 2nd respondent. However the petitioner himself represents the share of 2nd respondent. The aforesaid civil suit of the 1st respondent was decreed in full and a decree for possession of the suit land was awarded in favour of the 1st respondent and against the petitioner, as well as the 2nd respondent. The judgment & decree of the trial court are dated 31st December 1979.

3. Feeling aggrieved by the said judgment & decree of the trial court, the petitioner as well as the 2nd respondent preferred First Appeal No. 239 of 1980, which was dismissed for default on 3-2-1996. It appears that, there are no prayer for restoration of the said appeal, and therefore, the said dismissal has become final against the petitioner as well as against the 2nd respondent.

4. In the meantime the 1st respondent preferred Special Execution Petition No. 3 of 1993 for getting executed the said decree for possession etc. Notice was issued and the petitioner submitted objections stating that the trial court had no jurisdiction to entertain the suit and to pass a decree in view of the provisions contained in the Gujarat Devasthan Inam Abolition Act 1969.

5. The executing Court heard the parties, and rejected the said contentions of the petitioner and directed that the execution proceedings to proceed further in accordance with law.

6. Feeling aggrieved by the aforesaid order dated 17-7-1997 recorded by learned Civil Judge (S.D.) Palanpur in the aforesaid execution petition, the petitioner has preferred this Revision Application , challenging the said order of the said executing Court.

7. It has been mainly contended by learned counsel

appearing on behalf of the petitioner that, the decree passed is without jurisdiction and therefore, it is not executable.

8. I have heard learned advocates for the parties and have perused the papers.

9. Now, so far the facts of the suit are concerned, they are almost undisputed. The aforesaid civil suit was filed and the petitioner as well as the 2nd respondent were duly served, but they did not file written statement. However the 2nd respondent tendered oral testimony and also examined one witness Firozkhan Fulkhan. Then it was followed by the evidence of the petitioner Govindlal Shivlal. It shows that both the defendants, that is the father and son, had tendered oral testimony before the trial Court. However nowhere they have contended that the revenue entries are posted in accordance with the provisions contained in the aforesaid Act and therefore the entry cannot be challenged before the Civil Court.

10. So, on one hand there was no written statement filed by the present petitioner as well as by the 2nd respondent and on the other hand the aforesaid contention was not raised during the course of their oral evidence before the trial Court at Exhibit- 87 and Exhibit-112. Further there was no argument on the aforesaid aspect of the case till the conclusion of the said suit and till the decree was passed. The matter was then carried before this Court by way of First Appeal No. 239 of 1980. Before this Court the aforesaid contention was specifically raised as per the arguments of the learned advocate for the petitioner. However the said appeal was dismissed for default on 3-2-1996. Therefore there is no decision on merit on the aforesaid issue by this Court.

11. In aforesaid view of the matter, I am of the view that the aforesaid contention is not well founded and when it has not been raised before the Civil Court, it would be difficult for the executing court to appreciate the said contention. Moreover, the said contention is said to have been taken in First Appeal which was allowed to be dismissed for default. It would mean that the issue raised has not been pursued and therefore also it would be difficult for the executing Court to appreciate the said contention. In the aforesaid view of the matter it would not be open to the petitioner now to contend the said issue for the first time before the executing Court.

12. Then it has been considered by the lower Court that the entries posted in Revenue records in general and the entry relied upon by Mr. R.C. Kakkad and placed at page-112 does not appear to be an entry posted after going through the procedure laid down in the aforesaid Act of 1969. These are the entries posted by the Revenue authorities after the death of Kalubhai who was the father of the 2nd respondent as well as of the plaintiff, that is the respondent No.1. In fact the 1st respondent being the plaintiff in the suit was the brother of 2nd respondent and the 1st respondent was the son of 2nd respondent. It is therefore clear that the entries have been posted on account of family settlement between the parties.

13. The 1st respondent has specifically alleged that there was partition amongst the brothers being the sons of deceased Kalubhai who died in 1970. The 1st respondent has also claimed that, on account of said partition the suit land has fallen to the share of 1st respondent and therefore, the 1st respondent claimed the said property in the said suit. So this was a family dispute with respect to the family property which has nothing to do with the provisions contained in the aforesaid Act of 1969.

14. Then the lower Court has also dealt with the aforesaid issues and it can be very well gathered from para-3 of the judgment, which shows that, the issues were framed at Exhibit-18 and all the issues have been decided on merits. However the issue with respect to the applicability of the aforesaid Act does not appear to be framed for want of pleading to that respect.

15. In any way the entries make it clear that these were the entries posted on account of family settlement between the parties with respect to the family properties of the parties. Therefore there was no question of application of the said Act of 1969. Therefore it can not be said that the decree was passed without jurisdiction. Since the aforesaid issue did not arise for consideration either before the trial court which had decided Special Civil Suit No. 45/75 or before this Court which had dealt with and dismissed for default the First Appeal No. 239/80, nor did it arise in Special Execution Petition No.3/93.

16. Under the above said circumstances of the case, I am of the clear decision that, there is no question of applicability of the aforesaid Act of 1969, as the entries were not posted by dealing with the said Act.

Therefore if any wrong entry has been placed despite the family settlement and against the provisions and terms & conditions of the family settlement, then they could be very well challenged before the Civil Court, since they did not arise out of the aforesaid Act of 1969. Therefore, the decree cannot be treated to be without jurisdiction.

17. The executing Court was therefore right in holding that the decree was executable before the executing Court. The executing Court was also justified in directing that the execution to proceed further, according to law. Therefore the judgment & order of the executing Court are not found to be illegal, or without jurisdiction. Therefore there is no merit in the present revision and it deserves to be dismissed.

18. Learned Advocate Mr. R.C. Kakkad for the petitioner has relied upon certain decisions to argue that the issue of jurisdiction can be raised even before the executing Court. These decisions by and large relate to the power, function , jurisdiction and duty of the executing Court. There is no serious dispute about the same. However when they have been cited it would be just and proper to refer to them in a brief manner.

19. In BHAVAN VAJA AND OTHERS VS. SOLANKI HANUJI KHODAJI MANSANG AND ANOTHER, reported in A.I.R. 1972, S.C. 1371, reference is made to Sec. 47 of the Civil Procedure Code and duty of the executing Court has been enumerated. There it has been observed that, for construing a decree it can and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. There is no serious dispute about the principle, but as said above the applicability of the aforesaid Act of 1969 was never a subject matter of the dispute between the parties, considering the fact that the entries in dispute are posted on account of family settlement. Again there is no question of applicability of the aforesaid Act of 1969 even before this Court. Therefore the principle enunciated in the said decision will not be applicable to the case before me.

20. Almost similar view has been taken in SUNDER DASS VS. RAM PARKASH, A.I.R. 1977, S.C. 1201. There it has been observed that the executing Court cannot go behind the decree nor can it question its legality or correctness. It has been observed that, there is one exception to this general rule and that is that where the decree sought to be executed is a nullity for lack of

inherent jurisdiction in the court passing it, its invalidity can be set up in an executing proceeding. Again there is no dispute with respect to the said principle.

21. Almost similar view was taken in CHANDRIKA MISIR AND ANOTHER V. BHAIYALAL, reported in A.I.R. 1973 S.C. 2391.

22. In JASUBEN MADHUSUDAN PANDYA V. MANHARLAL NARANDAS BHATT, reported in 1990 (1) G.L.H. 199, it has been held that the issues may be framed by the Court from the allegations made on oath by parties, allegations made in pleadings or in answers to interrogatories and the contents of the documents produced by either party.

On the strength of the said decision, an attempt was made to argue by Mr. Kakkad that the trial Court ought to have framed the issues about jurisdiction of the Court. But the pleadings did not give rise to the framing of issue regarding the applicability of the said Act.

As said above, the entry in dispute is not an outcome of the applicability of the aforesaid Act, but it is an outcome of the family dispute between the parties. Therefore there was no question of framing any issue of jurisdiction in the Civil Court.

23. It should be considered that the two defendants who are the petitioner and respondent no.2 before this Court were represented by an advocate before the trial Court. They did not file written statement but they have preferred to cross examine witness of the 1st respondent extensively and also have led evidence before the trial Court. Nowhere they took the contention of applicability of the said Act. Moreover applicability of the said Act cannot be treated to be a subject matter of the dispute in view of the pleadings in the matter.

24. IN KURESHI HUSSAINBHAI MOTIBHAI & ORS V. SAIYED SIDAR KESHARBHAI & ORS, reported in 1985 (1) G L R, 139, it has been laid down by this Court that under section 135 of the Bombay Land Revenue Code 1879 the entries in the Revenue record of right have only presumptive value and only the Civil Court can decide the rights finally. Samething has been done in the present case by the Civil Court.

25. Almost a similar view has been taken in SANKALCHAND J PATEL V. VITHALBHAI J PATEL, reported in

1997 (2) G L R, 1041.

26. In STATE OF TAMIL NADU V. RAMALINGA SAMINGAL MADAM, reported in A I R 1986, S.C. 794, which is a matter related to Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act 1948, it has been observed that the jurisdiction of the Civil Court has been excluded. However, it has been observed that the adjudication on real nature of land by Civil Court was within the jurisdiction of the Civil Court.

27. The above Act was referred in the case of SRI. LA-SRI SIVAPRAKASHA PANDARA SANNADHI AVARGAL V. SMT. T. PARVATHI AMMAL & ORS, reported in 1998 (2) U.J. (S.C.) 214. There it has been observed that the jurisdiction of the Civil Court is not barred to adjudicate title of the parties under section 9 of the aforesaid Act of Tamil Nadu.

28. Even in BHALCHANDRA GOPALRAV TAMBEKAR V. DAKOR TOWN MUNICIPALITY, reported in 1979, G L R, 377, it has been observed that, the question about title of the land in question does not arise under Devasthan Inam Abolition Act and the dispute between two claimants is not a question which arises under the said Act of 1969.

29. In NARAYANRAO VASANTRAO KHARDE & ANR V. SHRIMATI MAHARAJASAHEB FATEHSINHRAO PRATAPSINHRAO GAEKWAD, reported in 1980 (2) G L R, 370, this Court had observed that the material proposition in a suit for specific performance would be possession of the property. The defendant taking plea that he was a tenant, the Court can observe that as the possession being material factor in a suit for injunction, the question of tenancy is not a material issue. Therefore the plea for tenancy does not arise and issue need not be referred to the tenancy Court.

30. In D.M. DESHPANDE AND OTHERS V. JANARDHAN KASHINATH KADAM (DEAD), reported in (1998) 8 SCC, 315, it has been observed that the issue of tenancy cannot be raised on a vogue plea, and the particulars as to how and when created and on what terms must be stated.

31. In STATE OF HIMACHAL PRADESH V. KESHAV RAM AND OTHERS, A I R 1997 S.C. 2181, it has been held that an entry in the Revenue records by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs. Now, it is well settled that the entry in the Revenue records have presumptive value and the entries are not conclusive proof of the title. However

this is not a matter in dispute before this Court, and the documents do not go to show that there was an issue arising under the aforesaid Act of 1969 before the Civil Court or before the executing Court. Therefore there was no question of reference to be made to the Competent Authority appointed under the said Act for adjudication of the issue between the parties.

32. In any case the decree of the Civil Court is not found to be within the jurisdiction. Same way the executing Court is not proved to have committed any error in deciding the issue before it. Therefore, the judgment & order of the executing Court cannot be treated to be illegal and therefore same cannot be set aside.

33. Again at the cost of repetition it is to be observed that, this was a matter of family settlement between the parties and no issue under the said Act of 1969 arose between the parties or before the Civil Court, and therefore, there was no question of deciding the said issue through the agency of Competent Authority under the said Act.

34. Anyway, the judgment & order of the executing Court are not illegal and there is no substance in the present Revision Application. The Revision Application is without any merits and hence it deserves to be dismissed. In the aforesaid circumstances, this Revision Application is ordered to be dismissed. Rule stands discharged. Interim relief granted earlier is ordered to be vacated. Petitioner shall pay the cost of the respondents and shall bear his own cost in this Revision Application.

DT: 16-06-2000

(D. P. BUCH, J)

/vgn.

Further Order:

After the pronouncement of the judgment, learned Advocate for the petitioner seeks time for approaching the Honourable Supreme Court in SLP. Time is being sought for a period of 8 weeks. Learned advocate for the

respondent objects to this stating that Gujarat Devasthan Inam Abolition Act, 1969 has been abolished, and therefore, there is no question of referring the matter under that Act, to the Competent Authority. The petitioner seeks time to file SLP. In the facts and circumstances of the case, 8 weeks time from today is granted and till then, the decree for possession shall not be executed.

Dt: 16-06-2000

(D.P. Buch, J)